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## TITLE 16. DEPARTMENT OF TRANSPORTATION

### CHAPTER 45. CONTRACTUAL CLAIM RESOLUTION PROCESS AND SUBSTANTIAL COMPLETION

Expires on June 26, 2013

#### SUBCHAPTER 1. GENERAL PROVISIONS

##### 16:45-1.1 Scope and purpose

This chapter describes and provides the procedures for the Department's contractual claim resolution process. The contractual claim resolution process is available to contractors whose claims meet the requirements for review contained in contracts administered by the Department. Participation by a contractor in the process is voluntary. The Department has established this process for the purpose of reviewing liability and damages claims at the same time and facilitating the resolution of contract disputes. This chapter also defines the term "substantial completion" as required by the Legislature pursuant to N.J.S.A. 27:7-34.

##### 16:45-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Commissioner" means the Commissioner of New Jersey Department of Transportation.

"Contract" means the written integrated agreement between the Department and the contractor setting forth the obligations of the parties, including, but not limited to, the performance of the work and the basis for payment. The contract includes the advertisement for proposal; the proposal; certification as to publication and notice of advertisement for proposal; appointment of agent by non-resident contractors; resolution of award of contract; executed form of contract; performance and payment bonds; specifications; plans; right-of-way plans; permits; boring logs; pavement core records; addenda; change orders; and field orders, all of which are to be treated as one instrument whether or not set forth at length in the form of contract. Other information mailed or otherwise made available to the prospective bidders before the receipt of bids is not part of the contract unless specified as such.

"Contract time" means the number of working days allowed to complete the work for a milestone or the date by which work must be completed, as provided in the contract and as modified by change order. When interim completion and completion requirements are specified as a specific date instead of the number of working days, the contractor must achieve interim completion or completion on or before that date.

"Contractor" means the individual, firm, partnership, corporation or any acceptable combination thereof contracting with the Department for performance of the contract; for the purpose of carrying out the contract, it also means the contractor's representative.

"Department" means the New Jersey Department of Transportation.

"Project" means the specific work to be accomplished under the contract. The project may include work performed by others under separate contracts, which are not the particular contract under which the contractor is asserting a claim.

"RE" means the Department's field representative having direct supervision of the administration of the contract.

"Specifications" means the compilation of provisions and requirements for the performance of prescribed work contained in the standard specifications, special provisions, and electrical materials specifications as modified by addenda.

#### 16:45-1.3 Litigation of claims by contractor

Exhaustion of the contractual claims resolution process, as set forth under the terms of the contract under which the contractor is asserting a claim and this chapter, shall not be a prerequisite to the filing of a legal action against the Department. The contractor, however, must fully comply with the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., before commencing a legal action against the Department. If a contractor brings a legal action against the Department or any agents, officers or employees thereof, allegedly arising out of or related to claims filed against the Department, any pending contractual claims resolution process at any step shall terminate as to those claims and as to related claims being litigated, whether or not the review has been completed at a particular step. The Department will, thereafter, resolve such claims under the legal action, subject to the provisions of the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq. The contractor may submit to the Department, for processing through the contractual claim resolution process, any claim that is unrelated to pending legal action, subject to the terms of the contract under which the contractor is asserting a claim and the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq.

### SUBCHAPTER 2. NOTICE REQUIREMENTS AND THE CONTRACTUAL CLAIM RESOLUTION PROCESS

#### 16:45-2.1 Notice requirements

(a) If the contractor has provided the RE notice of change that complies with the requirements contained in the contract under which the contractor is asserting a claim, the RE and the contractor may negotiate a resolution, even if the full impact has not been determined. If a notice of change has not been resolved, the contractor may initiate the contractual claims resolution process.

(b) To initiate the contractual claims resolution process, the contractor must submit to the RE a Contractual Notice Form for the claim. The form is available from the RE or may be obtained on the Department's website at: <http://www.state.nj.us/transportation/eng/forms/docs/construction/dc161.rtf>. At a minimum, the contractor must include the following information with the Contractual Notice Form:

1. A detailed factual statement of the claim providing all necessary dates, locations, and items affected by the claim;
2. The date on which facts arose that gave rise to the claim;
3. A copy of notice given to the Department pursuant to any other subsection of the contract that relates to the matter giving rise to the claim;
4. The name, function, and activity of each individual involved in or knowledgeable about the claim;

5. The specific provisions of the contract that support the claim and a statement of the reasons why the provisions support the claim;

6. A detailed factual statement of the actions taken by the contractor to mitigate the claim;

7. If the claim relates to a decision of the Department that the contract leaves to the Department's discretion or which the contract provides that the Department's decision is final, the contractor shall set out in detail the facts supporting its contention that the decision of the Department was fraudulent, arbitrary, or capricious;

8. The identification of documents and the substance of communications relating to such claim;

9. If an extension of contract time is sought, the specific days sought and the basis for the claim, supported by the contractor's approved baseline progress schedule and updates, as well as relevant information as required by the contract. The contractor must include a time impact evaluation of the delay that complies with the requirements contained in the contract under which the contractor is asserting a claim;

10. If additional payment is sought, the contractor must provide a breakdown of the amount sought in the manner that complies with the requirements contained in the contract under which the contractor is asserting a claim, or other calculations and basis of the amount sought;

11. If additional payment is sought, the contractor may provide the bid documents when escrowed with an escrow custody agent, in compliance with the requirements contained in the contract under which the contractor is asserting a claim; and

12. The contractor must state in writing that all documentation in support of the claim has been provided to the Department and that the contractor has requested that the review process begin.

(c) If the Department determines that the submitted Contractual Notice Form does not provide sufficient information, the Department will consider the form incomplete for the purpose of processing the claim under the contractual claim resolution process, and the Department will notify the contractor of the missing components required to start the process. The Department will not initiate formal discussions or meetings concerning a claim until the Contractual Notice Form is deemed complete by the Department.

(d) The Department will review alleged liability and damages during the claims resolution process.

#### 16:45-2.2 Contractual claim resolution process

(a) The Department will not process or review claims submitted by a subcontractor or supplier at any tier. Claims submitted by the contractor are eligible only for payment when there is an obligation or liability on the part of the contractor and shall not be a pass through of a claim by a subcontractor or by a supplier.

(b) The contractor may initiate the contractual claims resolution process pursuant to the contract.

(c) The contractual claims resolution process may continue beyond the "completion of the contract" as defined in the contract under which the contractor is asserting a claim; however, the contractual claims resolution process will not extend any statute of limitation that may apply to a claim.

(d) The contractual claims resolution process is sequential in nature and is composed of the following steps:

1. Step I -- Review of claim by the RE;
2. Step II -- Review by the Dispute Review Board;
3. Step III -- Review by the Claims Committee; and
4. Step IV -- Non-binding mediation;

(e) The Department will not allow a claim to proceed to the next level of review unless and until the claim has been reviewed at the preceding step. Additionally, the Department will not allow the claim to proceed to the next level until the contractor indicates in writing that the decision of the previous step is unacceptable and requests that the claim be forwarded to the next step within the specified timeframe. If during any step in the process, a claim is resolved, the contractor must sign an unconditional release, provided by the Department, as to all matters arising from the claim.

(f) The contractor is limited to the documentation provided to the Department at the beginning of Step I throughout all steps of the contractual claims resolution process. Submission of additional information by the contractor at any subsequent step is cause for the claim to be returned by the Department to Step I for review. The Department will inform the contractor in writing if the claim is returned to Step I. If a claim is returned, it must proceed through all steps in the process again.

(g) The Department will not pay interest on the amount of any payment made in resolution or settlement of a claim resolved through the contractual claims resolution process.

(h) When the value of the claim submitted by the contractor is \$20,000 or less, the Step II review will be the final step in the contractual claims resolution process. For such claims, the decision of the Dispute Review Board is final and terminates the contractual claims resolution process.

(i) Where there has been a determination at Step I or Step II that the contract does not provide a basis for the claim or that the contractor has failed to timely submit a notice of claim pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., the Department reserves the right to terminate the contractual claims resolution process at the end of Step II. For such claims, the Department's Claims Committee will provide the contractor with the reasons for the termination of the contractual claim resolution process and the rejection of the claim. The review of a claim at any step does not constitute a waiver by the Department of its defenses that the contract does not provide a basis for the claim or that the contractor failed to timely submit a notice of claim pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq.

(j) When the contractual claim resolution process is terminated for a claim as a result of the contractor's act or failure to act, the contractor waives its rights to further participation in the contractual claim resolution process for that claim.

### SUBCHAPTER 3. STEPS I, II, AND III OF THE CONTRACTUAL CLAIM RESOLUTION PROCESS: THE RE, THE DISPUTE REVIEW BOARD, AND THE CLAIMS COMMITTEE

#### 16:45-3.1 Step I: RE review of claim

(a) The RE will render a written decision regarding the claim presented by the contractor within 20 days after the RE has determined that sufficient information was provided by the

contractor on the Contractual Notice Form as described in N.J.A.C. 16:45-2.1. This time limit may be extended by mutual agreement of the parties.

(b) Within 10 days of the receipt of the decision by the RE, the contractor shall either accept or reject the decision in writing; or upon failure to accept or reject the decision in writing, the Department will terminate the contractual claim resolution process. If the contractor rejects the decision and intends to proceed to a Step II review, the contractor must request a Step II review within 10 days of receipt of the RE's decision.

#### 16:45-3.2 Step II: The Dispute Review Board (DRB)

(a) The DRB is comprised of three delegated members of the Department.

(b) If the contractor provides a timely written rejection of the RE's decision and a timely request to forward the claim to Step II, the RE will forward the claim and supporting information previously submitted by the contractor to the DRB within seven days of receipt of the contractor's request to forward the claim to the next step. The DRB will schedule and hold a meeting to review the claim with the contractor within 30 days of receipt of the claim information from the RE. This time limit may be extended by mutual agreement of the contractor and the Department. The DRB will issue a written decision regarding the claim within 20 days of the meeting.

(c) Within 15 days of the receipt of the decision by the DRB, the contractor shall either accept or reject the decision in writing; or upon failure to accept or reject the decision in writing, the Department will terminate the contractual claim resolution process. If the contractor rejects the decision and intends to proceed to a Step III review, the contractor must request a Step III review within 15 days of receipt of the DRB's decision. The contractor must submit the request to the Secretary of the Department Claims Committee, P.O. Box 600, Trenton, New Jersey 08625-0600.

#### 16:45-3.3 Step III: The Claims Committee

(a) The Claims Committee has the authority to review and to resolve claims arising from construction contracts administered by the Department, subject to the procedure provided in this subchapter. Claims are eligible for review by the Claims Committee subject to the terms of the contract under which the contractor is asserting a claim. The presentation of a claim to the Claims Committee shall in no way alter or affect other rights of a contractor, including the right, pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., to seek redress in the courts. The presentation to the Claims Committee shall in no way alter or affect the applicable statute of limitations. A contractor's request to have a claim reviewed by the Claims Committee is considered to be a form of alternate dispute resolution (ADR) and a settlement procedure available to the contractor; a Claims Committee decision, when conveyed to the contractor, constitutes a settlement offer.

(b) The Claims Committee is comprised of three delegated voting members of the Department's management. Additional non-voting members may include a Deputy Attorney General, the Secretary of the Claims Committee, and a member of the Federal Highway Administration. The Secretary of the Claims Committee may participate in deliberations but shall not have a vote as to recommendations. The Deputy Attorney General assigned by the Division of Law shall act as the legal advisor to the Committee but shall not have the right to vote.

(c) A contractor's request for review of a claim by the Claims Committee shall be in writing addressed to the Secretary of the Claims Committee. Upon determination by the Chairperson that the request for Claims Committee review complies with the requirements for review

contained in the contract under which the contractor is asserting a claim, the Claims Committee shall be assembled to review the claim.

(d) The Claims Committee will review only contractual claims brought by a contractor who is in direct privity with the State under a contract awarded by the Department. The Claims Committee will not review a claim or combination of claims valued less than \$250,000 until after the receipt of the conditional release as specified in the contract under which the contractor is asserting a claim. Upon receipt, the Claims Committee will review a claim or combination of claims valued more than \$250,000, unless the project is 75 percent or more complete as measured by contract time or total adjusted contract price, as defined in the contract under which the contractor is asserting a claim, whichever occurs first. If the project is 75 percent or more complete, the claim(s) will be reviewed after project completion. If the Claims Committee does not review a claim or combination of claims before completion, the Claims Committee will review the claim or combination of claims at a single session of the Claims Committee after the receipt of the conditional release as specified in the contract under which the contractor is asserting a claim, and all claims have been reviewed at Steps I and II of the contractual claim resolution process, as specified in the contract under which the contractor is asserting a claim. When reviewing a combination of claims, the Claims Committee will not review any individual claim valued less than \$20,000.

(e) If a request for a Claims Committee review meets the applicable requirements, the Secretary of the Claims Committee will schedule a Claims Committee review to be held within 60 days of the receipt of a request from the contractor. This time limit may be extended by mutual agreement of the Department and the contractor. The Claims Committee will notify the contractor in writing of its decision regarding the claim within 60 days of the review. Within 20 days of the receipt of the decision by the Claims Committee, the contractor shall either accept or reject the decision in writing, or upon failure to accept or reject the decision in writing, the Department will terminate the contractual claims resolution process. If the contractor rejects the decision and intends to proceed to a Step IV non-binding mediation, the contractor must request a Step IV non-binding mediation within 60 days of receipt of the Claims Committee's decision, as specified in the contract under which the contractor is asserting a claim. The contractor must submit the request to the Secretary of the Claims Committee.

(f) The procedures set forth in this section establish a method of reviewing contractual disputes and in no way constitute a waiver by the State of New Jersey of its sovereign immunity from suit.

(g) The Commissioner or the Commissioner's designee shall make a determination as to the Claims Committee's recommendation prior to any decision being rendered to a contractor with regard to any claim brought before the Claims Committee. Thereafter, the Secretary of the Claims Committee shall provide a written decision to the contractor that asserted the claim.

#### SUBCHAPTER 4. STEP IV OF THE CONTRACTUAL CLAIM RESOLUTION PROCESS: NON-BINDING MEDIATION

##### 16:45-4.1 Non-binding mediation

The Commissioner has authorized the use of non-binding mediation for resolving claims arising from construction contracts administered by the Department, as Step IV of the contractual claim resolution process. Non-binding mediation shall function as a supplement to the Claims Committee review process. It is available only for contracts which expressly provide for non-binding mediation of claims. The presentation of a claim to non-binding mediation is

voluntary and shall in no way alter or affect other rights of the contractor, including the right pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., to seek redress in the New Jersey Superior Court. The presentation to non-binding mediation shall in no way alter or affect the applicable statute of limitations. Non-binding mediation shall be available only for contractual claims brought by a contractor that is in direct privity with the State under a contract awarded by the Department. All claims must be presented in accordance with the contract under which the claim arises. Non-binding mediation shall be considered a form of ADR and a settlement procedure available to the contractor.

#### 16:45-4.2 Non-binding mediation procedures

(a) This section establishes the procedure for the non-binding mediation of contractual disputes and in no way constitutes a waiver by the State of New Jersey of its sovereign immunity from suit.

(b) If the contractor submits a timely request for a Step IV non-binding mediation, as required by the contract, and the Department tentatively agrees to participate in non-binding mediation, the contractor must satisfy the following conditions to proceed:

1. The contractor must enter into the Department's standard Step IV Non-binding Mediation Agreement (Step IV Agreement). The forms are available on the Department's website at: <http://www.state.nj.us/transportation/eng/forms/docs/construction/step4.rtf> and <http://www.state.nj.us/transportation/eng/forms/docs/construction/step4wconsultant.rtf>; and

2. The contractor must submit the names of six proposed mediators. The contractor must include the fee schedule and the biographical background listing the experience and qualifications of each candidate. If a candidate was engaged by the Department or the contractor, the contractor must identify the project and when the candidate served. If a candidate was employed by the Department or contractor, the contractor must identify when the candidate was employed and the candidate's job duties. The contractor may propose candidates that have been used for mediation purposes for this project or another project.

(c) The Department will select the mediator for the non-binding mediation from the list of candidates submitted by the contractor. If the Department rejects the proposed candidates, the Department will request that the contractor submit four additional candidates that meet the original criteria. The contractor must submit this additional list within 15 days of the receipt of a written request from the Department. Upon mutual agreement, the mediator can be an individual proposed by the Department.

(d) Upon selection of the mediator and the return of the executed Step IV Agreement and the contract, the Secretary of the Department Claims Committee will schedule a meeting for the non-binding mediation.

(e) The contractor and the Department will follow the process as detailed in the Step IV Agreement and the contract.

(f) If an agreement is reached at the non-binding mediation, it will be forwarded for Department approval.

#### 16:45-4.3 Disposition

Division 100--General Provisions (typically found in contract specifications sections 100 through 109, particularly section 107.12) of the specifications applicable to the particular contract under which the contractor is asserting a claim shall govern the disposition of claims. The Claims Committee Secretary shall notify the contractor in writing upon receipt of the

determination of the Commissioner or the Commissioner's designee which, when made, constitutes a settlement offer.

## SUBCHAPTER 5. SUBSTANTIAL COMPLETION

### 16:45-5.1 Purpose

The following definition of "substantial completion" is adopted pursuant to N.J.S.A. 27:7-34. This definition will be incorporated into contracts on the Department's construction projects, in substantially the same form as set forth in N.J.A.C. 16:45-5.2.

### 16:45-5.2 Definition of substantial completion

(a) "Substantial completion" means when all work is complete with the exception of landscaping items listed in the specifications of the particular contract; removal of soil, erosion and sediment control measures; final cleanup; and repair of unacceptable work, provided the RE has determined that:

1. The project is safe and convenient for use by the public;
2. Failure to complete the work and repairs excepted above will not result in the deterioration of other completed work; and
3. The value of the landscaping work remaining; removal of soil; erosion and sediment control measures; repairs; and cleanup is less than two percent of the total adjusted contract price.